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May 1, 2015

*By e-mail and regular mail*

Christopher M. DeVito, Esq.  
Morganstern, McAdams & DeVito Co., L.P.A.  
623 West St. Clair Ave.  
Cleveland, Ohio 44113  
chrismdevito@gmail.com

**Re:   Litigation Demand**

Dear Mr. DeVito:

I am writing to respond to your correspondence of April 14, 2015 in which you demand that I initiate litigation on behalf of the city of Lakewood to ensure the continued operation of Lakewood Hospital. I have read this correspondence, and the inflammatory and accusatory language you use suggests you do not appreciate that the city is attempting to identify the best course of action for Lakewood's residents and to determine what the future holds for Lakewood Hospital. While you are anxious to involve the city of Lakewood in a lawsuit (which could cost hundreds of thousands or even millions of taxpayer dollars), you fail to identify any causes of action or specific factual support for the claims that could potentially support such litigation. This failure is significant, particularly in light of the current status of the city's consideration of the proposal before it. At this point in time, the city has done nothing more than enter into non-binding discussions with the Lakewood Hospital Association and Cleveland Clinic to explore options for future health services benefiting Lakewood residents. No one has drawn a line in the sand, and no one has suggested that litigation is imminent or even necessary.

After careful review and analysis of your demand for litigation, I have determined that your correspondence is based on a number of misleading and conclusory allegations. Specifically, you identify a number of alleged conflicts of interest on the part of certain Lakewood public officials, and you fail to identify any causes of action or the alleged facts upon which those claims would

be based. Because of these and other deficiencies, I respectfully decline to bring your proposed lawsuit at this time. I will address some of the concerns you raise below.

**A. No Conflicts of Interest Exist.**

Your letter contrives a number of purported conflicts of interest that stem from Mayor Summers' and Councilmembers Mary Louise Madigan and Thomas Bullock's service as ex-officio members of the Lakewood Hospital Association's board of trustees. As you may know, this arrangement is nothing new (it has been in place since 1986, when your client, Mr. Graham, himself served on city council), and these individuals serve on the LHA board to ensure that the city's interests are represented and considered at LHA board meetings. This long-standing relationship has been examined and sanctioned by the Ohio Ethics Commission.

As historical background, Lakewood Hospital requested guidance from the OEC in 1986 as to whether conflict of interests existed under the Ohio ethics laws that would prevent the mayor and council members from serving as ex-officio members of the LHA board. The OEC provided an advisory opinion to Lakewood Hospital, making it clear that such service was permitted.<sup>1</sup> With this understanding, our elected officials have protected our residents' best interests through their service on the LHA board. Please review the decision; it should resolve any of your concerns about a prohibited conflict of interest arising from our Lakewood officials' service on the board.

Nor does the service of certain colleagues or family members of the Mayor and Councilman Ryan Nowlin as *unpaid, volunteer* trustees on the board of the LHA and Lakewood Hospital Foundation create any conflict of interest. As you may know, Wendy Summers' service on the LHF board predates Mayor Summers' election as mayor of Lakewood. Moreover, as stated above, she does not derive any compensation or personal gain from her service on the board. Similarly, the fact that Councilman Nowlin's colleagues serve on the LHA board and on the board of LHF creates no conflict of interest. Neither individual is paid for service on the boards, and Councilman Nowlin's firm is not representing either LHA or LHF in connection with the future plan for Lakewood Hospital currently under consideration by Council.

Finally, it bears repeating that City Council is merely reviewing and considering a non-binding proposal (which was not signed onto by the city) in relation to the future of Lakewood Hospital. Because there have been no official actions taken by our elected officers with respect to this proposal, your suggestion of a lawsuit to redress any action is entirely without merit.

We have sought additional guidance from the OEC in these matters, and will await its analysis of these issues. Regardless, it makes little sense to prepare a lawsuit based upon any issues stemming from the mayor's and councilmembers' obligatory service on the LHA board, Mrs. Summers' unpaid, volunteer service on the LHF board or Councilman Nowlin's colleagues' unpaid, volunteer service on both the LHA and LHF boards.

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<sup>1</sup> I have enclosed a copy of the September 3, 1986 advisory opinion.

**B. There is no Basis to Initiate Legal Action Preventing the City from Considering Options for the Future of Lakewood Hospital.**

The city is still trying to determine what the future holds for Lakewood Hospital. Rather than file a lawsuit that has a questionable chance of success (at best), the city has chosen to work with the Cleveland Clinic and the LHA collaboratively to explore all potential options for Lakewood Hospital. The Mayor and City Council are currently conducting due diligence on the option of replacing Lakewood Hospital with a comprehensive family health center administered by the Cleveland Clinic, along with the formation of a community wellness foundation that would be intended to serve the health and wellness of Lakewood's residents for years to come.

You have intimated that you were made to believe this proposal was already approved by the city, which comes as quite a surprise to me. This letter should disabuse you of that notion. It is not yet clear whether the proposal will be approved (a decision that will be made by the elected public officials of Lakewood through a deliberative legislative process), but we can certainly agree that a lawsuit such as the one you have suggested will radically alter the city's current negotiating stance with the Cleveland Clinic and LHA and its ability to perform the due diligence it has recently undertaken. I see no reason to intervene in this exercise of the democratic process, and I will not take any action that would prevent our officials from discharging their obligations as the elected stewards of our city.

**C. Conclusion.**

I see no good-faith basis for bringing an action seeking to enjoin Lakewood's public officials from engaging in the legislative process, performing due diligence and participating in discussions of the best options for the providing health care options to the city's residents. Should you decide to bring such an action, I would advise you that, pursuant to Ohio Revised Code § 733.61, you would need to actually prevail on your claims in order to even be considered for a discretionary award of attorneys' fees. Given the frivolous nature of the action contemplated, such an award seems highly unlikely.

I have done my best to try to explain why I must decline your litigation demand. I hope that my comments have persuaded you that the course of action you have proposed is founded on misconceptions and not suited for our current negotiating position. Thank you for your correspondence.

Very truly yours,



Kevin M. Butler



OHIO ETHICS COMMISSION

THE ATLAS BUILDING  
8 EAST LONG STREET, SUITE 210  
COLUMBUS, OHIO 43215  
(614) 466-7090

September 3, 1986

Fred M. DeGrandis, Esquire  
Vice President/General Counsel  
Lakewood Hospital  
14513 Detroit Avenue  
Lakewood, Ohio 44107

Dear Mr. DeGrandis:

In your letter dated June 16, 1986, you asked whether the Ohio Ethics Law and related statutes would prohibit a city council and mayor from approving an ordinance authorizing the lease of a city hospital to a non-sectarian, non-profit charitable corporation, if the lease provides that the mayor, two members of city council selected by the council, and other city officials would serve on the hospital board of trustees. In addition, you asked whether such city officials would be prohibited from serving on the board of trustees following authorization.

You stated, by way of history, that a city owns a hospital and operates it through a board of trustees consisting of the mayor, a city council member who chairs the hospital committee, the city health director, and fifteen other members appointed by the mayor. You stated further that a city charter amendment was sought by the city and approved by the voters in 1985, permitting the conversion of the hospital to a non-profit corporation. You indicated that the current board of trustees has presented to city council a proposed lease with a non-sectarian, non-profit charitable corporation governed by a board of trustees consisting of the mayor, two members of city council selected by council, three representatives of community organizations, the immediate past president of the hospital medical staff, and thirteen members of the current board of trustees. You indicated further that the proposed ordinance authorizing the lease specifically acknowledges the participation of the city, through the current board of trustees and city council, in the organization of the corporation. It also provides that the mayor, city council members, and current trustees are designated to serve on the board of trustees of the corporation and are instructed to represent the interests of the city until the expiration of their terms as city officials or employees. Finally, you stated that the board of trustees are precluded from receiving any compensation for their services, and that the lease is for the term of thirty years, renewable at the option of the corporation for an additional thirty years. You asked whether the Ohio Ethics Law and related statutes would prohibit the transaction.

Division (A) of Section 2921.42 of the Revised Code provides the following, in pertinent part:

- (A) No public official shall knowingly do any of the following:
  - (1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest;



. . .

- (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

A city mayor or a member of city council is a "public official" as defined in Division (A) of Section 2921.42 of the Revised Code, since he is an elected officer of a political subdivision of the state (See: Ohio Ethics Commission Advisory Opinions No. 85-002 and 85-008). Similarly, a member of the board of trustees of a municipal hospital is a "public official," since he is appointed to an office of the city. A lease of a city hospital to a non-sectarian, non-profit charitable corporation is a "public contract," since it is a contract for the purchase or acquisition of the management and operation of the hospital by the corporation. Thus, a city official is prohibited from voting, authorizing, or otherwise using the authority or influence of his office to secure approval of a public contract with a non-profit corporation in which he serves as a board member. In addition, a city official is prohibited from serving as a board member of a non-profit corporation under contract with the city (See: Ohio Ethics Commission Advisory Opinion No. 81-008).

However, these provisions do not apply under circumstances in which a governmental entity participates in or creates a non-profit corporation and designates public officials to serve on its governing body. In Advisory Opinions No. 83-010 and 84-001 (copies enclosed), the Commission held that a city official or employee is not prohibited from serving on the board of a non-profit corporation, provided that he is serving in his official capacity as designated by city council and that no other conflict of interest exists. Specifically, the Commission stated that the following criteria must be satisfied: (1) the governmental entity must create or be a participant in the non-profit corporation; (2) any public official or employee connected with the jurisdiction, including a council member, may be designated to serve on the board of the non-profit corporation, but the elected legislative authority or the appointed governing body must formally designate the office or position to represent the governmental entity; (3) the public official or employee must be formally instructed to represent the governmental entity and its interests; and (4) there must be no other conflict of interest on the part of the designated representative. For example, he must not use his official position to benefit himself personally (See: Division (D) of Section 102.03 of the Revised Code).

Under the facts presented, the voters have approved a city charter amendment permitting the conversion of the city hospital to a non-sectarian, non-profit charitable corporation, and the current board of trustees, city council, and mayor have participated in the creation of the corporation. Also, the ordinance designates the city officials to serve on the board of trustees of the corporation and formally instructs them to serve the interests of the city. Finally, the organization prohibits compensation for board members, which helps to avoid a major, potential conflict of interest. Thus, the city is adhering to the criteria established in Advisory Opinions No. 83-010 and 84-001, and the city council and mayor would not be prohibited from authorizing the ordinance and organization as proposed. In addition, the city officials would not be prohibited from serving on the board of trustees of the hospital in their official capacities.

Fred M. DeGrandis, Esquire  
September 3, 1986  
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This opinion represents the views of the Commission at its meeting on September 3, 1986. It is based on the facts presented and is limited to questions arising under Chapter 102. and Section 2921.42 of the Revised Code. If you have any questions, or wish to request a formal advisory opinion from the Commission, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "James M. Long". The signature is written in dark ink and is positioned above the printed name and title.

James M. Long  
Assistant Executive Director

JML:sm

Enclosures